Musa bin Keran v Public Service Commission Malaysia

HIGH COURT — ORIGINATING MOTION NO 14 OF 1995
ABDUL MALIK ISHAK J
26 MAY 1995

Administrative Law *— Remedies — Certiorari — Non-compliance with the Rules of the High Court — Whether procedural defects rendered proceedings nullity or irregular — Rules of the High Court 1980 O 53 r 2(1)*

The applicant applied for an order of certiorari ex parte by way of a notice of motion dated 23 July 1985 (encl 3). The application was supported by a statement (encl 2) setting out the name and description of the applicant, the reliefs sought and the grounds relied upon. The statement was verified by an affidavit affirmed by the applicant (encl 1). The applicant was granted leave for judicial review. Upon obtaining leave, the applicant filed an originating notice of motion dated 29 August 1985 (encl 7) but without enclosing copies of the statement and the affidavit. Instead, the applicant gave notice to the respondent which was incorporated in encl 7 and served on the Public Service Commission ('the respondent') and the Attorney General, on 22 October 1985. The hearing as listed in encl 7 was 30 October 1985.

By encl 2, the applicant averred that the respondent erred in law on the face of the record in that the respondent misdirected itself in that the applicant was negligent, had used his office for his own benefit, inefficient, dishonest and acted without responsibility; the respondent erred in law and there were errors in law on the face of the record in that the Public Service Commission misdirected itself in presuming that the applicant was involved in the smuggling of the video cassette recorder on 20 December 1983; and the respondent had acted in excess of its jurisdiction in presuming the applicant was guilty of the charges levied against him.

The respondent argued that the application was not properly made as there was non-compliance with O 53 r 3(1) of the RHC, and this was a fatal procedural defect which could not be cured.

Held, dismissing the application:

(1) The general rule under O 53 r 3(1) of the Rules of the High Court ('RHC') was that the court would not at the hearing allow the applicant to rely on any grounds or seek any relief not set out in the statement. The Rules had statutory force and must prima facie be obeyed.

(2) A strict approach had to be adopted. The statement and the affidavit of the applicant were important in the application for

an order of certiorari and these documents had to be served with the notice of motion to the respondent and the Attorney General. The present application failed to comply with O 53 r 2(1) of the RHC which provided that there had to be at least eight clear days between the service of the notice of motion and the day named therein for the hearing, for there were only seven clear days after service of the notice of motion.

(3) The settled law was that only an error of law on the face of the record would attract judicial review and nothing short of it would suffice. Before an order of certiorari would be granted in respect of an error of law on the face of the record, it had to be shown that the error had played a part in the decision arrived at.

(4) Applying the above principle to the present case and looking at paras 3(a), (b) and (c) of encl 2, there was nothing in sub-para (a) to show that the error had played a part in the decision arrived at by the Public Service Commission. Without stating the ground on which the applicant was relying, the respondent was in a dilemma as to the correct approach to adopt in rebutting the allegation of a misdirection of an error of law on the face of the record. As regards sub-para (b), the wordings were ambiguous and unclear as those words could either be a misdirection of law or of fact and being nuclear and unknown, the respondent was placed in a difficulty to rebut.

(5) Jurisdictional defect might be founded on the character and the constitution of the authority or the nature of the subject matter of the inquiry or the absence of some preliminary proceeding which was necessary to give it jurisdiction. However, the words in sub-para (c) were vague and uncertain. Moreover, where the Public Service Commission had jurisdiction to entertain the applicant's matter, that jurisdiction remained intact and did not lose its character even though it came to a wrong conclusion on the question of whether it was wrong in law or in fact. Furthermore, since the applicant had been asked to show cause as to why he should not be dismissed from the public service, it could not be said that the respondent had acted contrary to the rule of natural justice in dismissing the applicant.

(6) Certain grounds in the affidavit of the applicant could not be relied upon by the applicant as these grounds were not specified in the statement in encl 2, which was contrary to O 53 r 3(1) of the RHC. In fact the statement in encl 2 and the affidavit in encl 1, which were the documents which supported the application of the applicant, were not attached nor exhibited in the notice of motion for the substantive application in encl 7 and were not served on the Attorney General.

(7) All the procedural defects were so grave and serious that they rendered these proceedings a nullity.

A [**Bahasa Malaysia summary**

Pemohon memohon untuk satu perintah certiorari ex parte melalui satu notis usul bertarikh 23 Julai 1985 (kandungan 3). Permohonan itu disokong oleh satu pernyataan (kandungan 2) yang menyatakan nama dan perincian pemohon, relief yang dipohon dan alasan-
B alasan yang berkenaan. Pernyataan itu ditentusahkan oleh satu afidavit yang diikrarkan oleh pemohon (kandungan 1). Pemohon telah diberikan kebenaran untuk memohon kajian semula kehakiman. Selepas memperolehi kebenaran, pemohon pun memfailkan satu notis usul pemula bertarikh 29 Ogos 1985 (kandungan 7) tetapi tanpa menyertakan salinan pernyataan dan
C afidavit itu. Sebaliknya, pemohon memberikan notis kepada penentang yang dimasukkan ke dalam kandungan 7 dan disampaikan kepada Suruhanjaya Perkhidmatan Awam ('penentang') dan Peguam Negara pada 22 Oktober 1985. Tarikh pembicaraan seperti yang disenaraikan di dalam kandungan 7
D adalah 30 Oktober 1985.

Melalui kandungan 2, pemohon membuat avermen bahawa penentang tersilap di sisi undang-undang atas muka rekod yakni penentang tersalah arah dirinya kerana memutuskan bahawa pemohon cuai, telah menggunakan jawatannya untuk faedah sendiri, tidak cekap, tidak jujur dan bertindak secara tidak
E bertanggung jawab; bahawa penentang tersilap di sisi undang-undang dan terdapat kesilapan undang-undang atas muka rekod yakni penentang tersalah arah dirinya ketika menganggap bahawa pemohon terlibat dalam penyeludupan perakam video keset pada 20 Disember 1983; dan penentang telah bertindak melebihi bidang
F kuasanya ketika menganggap bahawa pemohon bersalah atas tuduhan yang dikemukakan terhadapnya.

Penentang berhujah bahawa permohonan itu tidak dibuat dengan teratur kerana terdapat ketidakpatuhan A 53 k 3(1) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), dan ini adalah satu
G kecacatan prosedur yang teruk dan tidak boleh diperbaiki

Diputuskan, menolak permohonan itu:

(1) Kaedah am di bawah A 53 k 3(1) KMT adalah mahkamah di pembicaraan tidak akan membenarkan pemohon bergantung kepada mana-mana alasan atau menuntut apa-apa relief yang
H tidak dinyatakan di dalam pernyataan. KMT mempunyai kuasa statutori dan prima facie mesti dipatuhi.

(2) Satu pendekatan yang tegas mesti digunakan. Pernyataan dan afidavit pemohon adalah penting di dalam permohonan untuk perintah certiorari dan dokumen-dokumen ini mesti
I disampaikan bersama notis usul kepada penentang dan Peguam Negara. Permohonan ini telah gagal mematuhi A 53 k 2(1) KMT yang memperuntukkan bahawa mestilah terdapat sekurang-kurangnya lapan hari di antara penyampaian notis

usul dan tarikh yang dinyatakan di dalam notis untuk pembicaraan, kerana cuma terdapat tujuh hari selepas penyampaian notis usul. A

(3) Undang-undang mantap menyatakan bahawa cuma satu kesilapan undang-undang pada muka rekod akan menarik kajian semula kehakiman dan apa-apa yang kurang daripada itu tidaklah mencukupi. Sebelum satu perintah certiorari boleh diberikan berkaitan dengan satu kesilapan undang-undang atas muka rekod, mestilah ditunjukkan bahawa kesilapan itu telah memainkan satu peranan di dalam mencapai keputusan itu. B

(4) Memakai prinsip di atas kepada kes ini dan melihat perenggan 3(a), (b) dan (c) kandungan 2, tidak terdapat apa-apa di dalam perenggan kecil (a) yang menunjukkan bahawa kesilapan itu telah memainkan peranan di dalam keputusan yang dicapai oleh penentang. Tanpa menyatakan alasan yang pemohon bergantung kepada, penentang menghadapi masalah dalam memilih cara yang betul untuk mematahkan pengataan salah arahan kesilapan undang-undang atas muka rekod. Berkenaan dengan perenggan kecil (b), perkataan-perkataan di situ adalah taksah dan tidak jelas kerana perkataan-perkataan itu boleh membawa makna salah arahan undang-undang atau fakta dan kerana ianya tidak jelas dan tidak diketahui, penentang diletakkan di dalam kesulitan untuk mematahkan pengataan itu. C D E

(5) Kecacatan bidang kuasa boleh diasaskan atas sifat dan perbadanan pihak berkuasa itu atau sifat bahan perkara siasatan itu atau ketiadaan prosiding awal yang diperlukan untuk memberikannya bidang kuasa. Namun demikian, perkataan-perkataan di dalam perenggan kecil (c) adalah taksah dan tidak pasti. Lagipun, di mana penentang mempunyai bidang kuasa untuk melayan perkara pemohon, bidang kuasa itu kekal dan tidak kehilangan sifatnya biarpun ianya mencapai kesimpulan yang salah atas soalan sama ada ianya salah di sisi undang-undang atau dari segi fakta. Tambahan pula, memandangkan yang pemohon telah disuruh memberi sebab mengapa beliau tidak patut dipecat dari perkhidmatan awam, tidaklah boleh dikatakan bahawa penentang telah bertindak bercanggahan dengan kaedah keadilan asasi dalam menolak permohonan itu. F G H

(6) Alasan-alasan tertentu di dalam afidavit pemohon tidak boleh digantung kepada oleh pemohon kerana alasan itu tidak dinyatakan di dalam pernyataan di dalam kandungan 2 dan ini adalah bertentangan dengan A 53 k 3(1) KMT. Pada hakikatnya pernyataan di dalam kandungan 2 dan afidavit di dalam kandungan 1, yang merupakan dokumen yang menyokong permohonan pemohon, tidak dikepilkan bersama dengan atau ditunjukkan di dalam notis usul untuk I

permohonan substantif dalam kandungan 7 dan tidak disampaikan kepada Peguam Negara.

(7) Semua kecacatan prosedur itu begitu teruk dan serius sehinggakan mereka mengakibatkan prosiding ini terbatal.]

Notes

For cases on certiorari, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 96–227.

Cases referred to

Anisminic Ltd v Foreign Compensation Commission [1968] 2 QB 862; [1967] 3 WLR 382; [1967] 2 All ER 986 (refd)

Baldwin & Francis Ltd v Patents Appeal Tribunal [1959] AC 663; [1959] 2 WLR 826; [1959] 2 All ER 433 (refd)

Cik Aniza Yaacob & Ors v Mostek Malaysia Sdn Bhd & Ors [1988] 1 MLJ 451 (refd)

Colonial Bank of Australasia v Willan (1874) LR 5 PC 417 (folld)

Dr A Dutt v Assunta Hospital [1981] 1 MLJ 304 (folld)

Harkness v Bell's Asbestos & Engineering Ltd [1967] 2 QB 729; [1967] 2 WLR 29; [1966] 3 All ER 843 (folld)

Jasabena Sdn Bhd v Beh Heng Poo & Anor [1985] 1 MLJ 396 (refd)

Mak Sik Kwong v Minister of Home Affairs, Malaysia (No 2) [1975] 2 MLJ 175 (folld)

Mersing Omnibus v Minister of Labour and Manpower & Anor [1983] 2 MLJ 54 (folld)

Minister of Labour and Manpower & Anor v Paterson Candy (Malaysia) Sdn Bhd [1980] 2 MLJ 122 (FC) (folld)

Mohamed Noor bin Othman & Ors v Haji Mohamed Ismail bin Hj Ibrahim & Ors [1988] 3 MLJ 82 (refd)

Pacific Centre Sdn Bhd v United Engineers (Malaysia) Bhd [1984] 2 MLJ 143 (refd)

R v Justices of the Central Criminal Court (1886) 17 QBD 598 (folld)

R v Ludlow, ex p Barnsley Corporation [1947] KB 634; [1947] 1 All ER 880 (folld)

R v Northumberland Compensation Appeal Tribunal, ex p Shaw [1952] 1 KB 338; [1952] 1 All ER 122 (refd)

R v Patents Appeal Tribunal, ex p British United Shoe Machinery Co Ltd (1970) RPC 282 (folld)

Ratnam v Cumarasamy & Anor [1965] MLJ 228 (folld)

Rohana bte Ariffin v Universiti Sains Malaysia [1988] 2 MLJ 609 (refd)

Syarikat Telekom Malaysia Bhd v Business Chinese Directory Sdn Bhd [1993] 2 AMR 37: 2154 (folld)

Legislation referred to

Courts of Judicature Act 1964 s 17
Interpretation Acts 1948 and 1967 (Act 388) s 3
Rules of the High Court 1980 O 2 r 1(1), O 3 r 2(4), O 53 r 1(2), 1A, 2(1), 2(4), 3(1)

T Balaskanda (*Zaman & Associates*) for the applicant.
Teo Say Eng (Senior Federal Counsel) for the respondent.

Abdul Malik Ishak J: This was an application for an order of certiorari. The applicant applied ex parte by way of a notice of motion dated 23 July 1985 (encl 3) instead of by way of an ex parte summons-in-chambers for leave before Shankar J (now JCA) and that application was supported by a statement (encl 2) setting out the name and description of the applicant, the reliefs sought and the grounds relied upon. The statement which was dated 25 March 1985 was verified by an affidavit affirmed by the applicant dated 25 March 1985 (encl 1). The notice of that application for leave was served on the Attorney General's Chambers on 16 August 1985 and copies of the statement and the affidavit were lodged in those Chambers (see affidavit of service in encl 5). On 19 August 1985, Shankar J (now JCA) gave leave and ordered, inter alia, that 'all proceedings in the matter be stayed pending final determination or further order' (encl 11). The steps for leave to be given are clearly set out in O 53 rr 1(1) to 1(5) of the Rules of the High Court 1980 ('RHC') and I need not dwell on them at length. Suffice for me to say that under O 53 r 1A of the RHC an application for leave must be made within six (6) weeks after the date of the proceedings or time prescribed by any written law or the delay must be accounted for to the satisfaction of the court. Where the proceeding in question is subject to appeal the court may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

Now, reverting back to the present case, the applicant upon obtaining leave filed an originating notice of motion dated 29 August 1985 (encl 7) but without enclosing copies of the statement and the affidavit (see O 53 r 2(1) and r 3(1) of the RHC). Instead, the applicant adopted a novel approach by giving notice to the respondent incorporated in the originating notice of motion (encl 7) in the following terms:

> And take notice that on the hearing of this motion, the applicant will use the statement dated 25 March 1985 and the affidavit of Musa bin Keran sworn on 25 March 1985 and the exhibits therein referred to.

It was in this fashion that encl 7 were served on the respondent and the Attorney General on 22 October 1985 as reflected in the affidavit of service in encl 16 and this prompted the learned senior federal counsel to object and he argued that the application for certiorari was not properly made as there was non-compliance with O 53 r 3(1) of the RHC. This was said to be fatal as it went to the procedural defect which could not be cured. In *Mersing Omnibus v Minister of Labour and*

Manpower & Anor [1983] 2 MLJ 54, Abdoolcader FJ (as he then was) in construing O 53 rr 1 and 1A of the RHC were of the view that the imperative requirements of that order must be complied with before an application for certiorari can be made. The learned senior federal counsel sought to draw a parallel with *Mersing Omnibus* and argued that the mandatory procedural provisions of the RHC like O 53 r 3(1) must be adhered to without fail. It was said that the RHC has statutory force and it should be obeyed (*Pacific Centre Sdn Bhd v United Engineers (Malaysia) Bhd* [1984] 2 MLJ 143). The Supreme Court in *Mohamed Noor bin Othman & Ors v Haji Mohamed Ismail bin Hj Ibrahim & Ors* [1988] 3 MLJ 82 had succinctly stated that: 'For it is trite law that where the words of a statute are clear there is no room for the court to go beyond the expressed language of the statute.' In *Mersing Omnibus*, Abdoolcader FJ (as he then was) in the context of the facts of that case where the Minister of Labour had given his decision on 23 November 1981 to the effect that the appellant extend recognition to the second respondent for the categories of employees stipulated therein and it was only on 9 January 1982 that the appellant sought leave to apply for certiorari to quash the decision of the Minister. That leave was granted but subsequently on the substantive application for certiorari, the application was dismissed. The appellant appealed. But since there was a breach of O 53 r 1A of the RHC in that the application for leave was made after the period of six weeks from the decision of the Minister and no application for extension of time was made nor was the delay accounted for, Abdoolcader FJ (as he then was) applied rigidly the words employed in O 53 r 1A of the RHC and in his illuminating judgment at p 55 said that:

> Lord Hodson said in his judgment in *Secretary of State for Defence v Warn* [1970] AC 394, 402: 'Procedural sections are usually mandatory and there is nothing which points to the contrary in this case.' In the matter before us the terms of O 53 rr 1 and 1A clearly reflect the imperative requirements which must be complied with before an application for certiorari can be made. Power in the High Court in regard to certiorari is provided for in the Courts of Judicature Act 1964 in para 1 of the Schedule thereto which sets out the additional powers of the High Court referred to in s 25(2) of the Act but the proviso to s 25 specifically enacts that all such powers of the High Court in the exercise of its jurisdiction as are referred to therein shall be exercised in accordance with any written law or rules of court relating to the same (*Pahang South Union Omnibus Co Bhd v Minister of Labour and Manpower & Anor* [1981] 2 MLJ 199, 204). We should perhaps mention that when we first put the point in question to counsel for the respondents for their views, both of them somewhat half-heartedly indicated they were taking no objection on this aspect, presumably because it had never occurred to them before, and that they were prepared to waive non-compliance with the provisions of O 53 r 1A if there was any; but after an overnight adjournment granted at the request of counsel for the appellant, counsel for both respondents resiled and changed their stance and now said that the appellant was indeed time-barred and in breach of the rule, with senior federal counsel appearing for the Minister stating that this was the result of one night's

research, though we did not have the benefit of sharing in the fruits of his research. In any event jurisdiction does not originate in the consent of the parties and cannot be established, where it is absent, by such consent or acquiescence (*Federal Hotel Sdn Bhd v National Union of Hotel, Bar & Restaurant Workers* [1983] 1 MLJ 175, 178). A

Mohamed Dzaiddin J (now FCJ) in *Cik Aniza Yaacob & Ors v Mostek Malaysia Sdn Bhd & Ors* [1988] 1 MLJ 451 considered *Mersing Omnibus* and held, inter alia, that since leave to apply for an order of certiorari was already granted on an originating motion and even though the applicants there had used the same originating motion to apply for the substantive order as they did when they obtained leave, yet this was said to be an error in form and that there was no injustice done to the respondents or that the respondents were not in any way prejudiced by such procedural error committed by the applicants. The error was described as a mere irregularity which was curable under O 2 r 1(1) of the RHC. The same relaxed approach was also adopted by Edgar Joseph Jr J (now FCJ) in *Rohana bte Ariffin v Universiti Sains Malaysia* [1988] 2 MLJ 609. Before the substantive applications were heard in *Rohana*'s case, a preliminary objection, inter alia, was raised by the respondent. It was contended that under O 53 r 2(4) of the RHC, an affidavit of service is to be filed before the motion or summons is entered for hearing. Service must, in practice, be effected within 14 days after the grant of leave. It was contended that this procedure was not followed in the present case and therefore the applications were incompetent and should therefore be dismissed in limine. His Lordship Edgar Joseph Jr J (now FCJ) in dismissing the preliminary objection ruled that even if there has been a breach of O 53 r 2(4) of the RHC, the court should condone the breach since the respondent suffered no prejudice. B C D E F

Earlier on in 1985, in *Jasabena Sdn Bhd v Beh Heng Poo & Anor* [1985] 1 MLJ 396, Edgar Joseph Jr J (now FCJ) in adopting the same relaxed approach observed:

> I consider that to require the applicant to obtain a date for hearing within 14 days of leave having been granted may pose insuperable problems to an applicant where, for example, no judge is available to hear the application. The suggestion that this problem may be overcome by obtaining a date for hearing within the stipulated 14-day period notwithstanding the non-availability of a judge and then having the application adjourned so as to comply with the requirement is in my view a pointless ritual serving no practical purpose and I have no hesitation in rejecting it. G H
>
> It is my opinion, therefore, that for purposes of O 53 r 2(2) 'filing' corresponds to 'entry' so that there is sufficient compliance once the applicant files his application within 14 days after leave has been granted.
>
> Alternatively, if contrary to my primary opinion, there has been a breach of O 53 r 2(2) by the applicant, then, I would regard its requirements as purely directory and therefore capable of being condoned under the provisions of O 2 r 1(1). I

For my part, I prefer the strict approach to be adopted in construing the RHC as adopted by Abdoolcader FJ (as he then was) in *Mersing Omnibus*. In my judgment, the statement and the affidavit of the applicant play important roles in the substantive application for an order of certiorari and these documents must be served with the notice of motion to the respondent and the Attorney General not like what was done in encl 7. Indeed, the general rule is that at the hearing the court will not allow the applicant to rely on any grounds or seek any relief not set out in the statement (O 53 r 3(1) of the RHC). In *Dr A Dutt v Assunta Hospital* [1981] 1 MLJ 304 (FC), Chang Min Tat FJ (as he then was) delivering the judgment of the Federal Court castigated the failure of the applicant (the Hospital) to file a statement of grounds, thereby allowing the applicant to 'roam at large, well outside its proper confines.' Towards this end, Chang Min Tat FJ (as he then was) said that the High Court should not have resorted to the affidavit for the grounds on which the application was brought, as the rule was clear that all grounds had to be set out in the statement. It is not out of place to mention that the RHC is the code of procedure for legal practitioners in the country. Since the RHC was enacted in the exercise of the powers conferred by s 17 of the Courts of Judicature Act 1964, with the consent of the Chief Justices of Malaya and Borneo (now Sabah and Sarawak) and the Rules Committee and comprised in PU(A) 50/80, the RHC is clearly a subsidiary legislation within the meaning of s 3 of the Interpretation Acts 1948 and 1967 (Act 388). Put bluntly, the RHC has statutory force and the Privy Council in *Ratnam v Cumarasamy & Anor* [1965] MLJ 228 rightly held that the Rules of Court must prima facie be obeyed. In 1993, his Lordship Mohd Eusoff bin Chin (now Chief Justice of the Federal Court) in terse words said in *Syarikat Telekom Malaysia Bhd v Business Chinese Directory Sdn Bhd* [1993] 2 AMR 37:2154: 'Failure to comply with them will lead to chaos in the conduct of litigation.'

For these reasons, I acceded to this part of the preliminary objection advanced by the learned senior federal counsel.

Next, in the preliminary objection, the learned senior federal counsel grounded his argument to the effect that there was short service of the notice of motion in encl 7. Order 53 r 2(1) of the RHC clearly states that there must be at least eight clear days between the service of the notice of motion and the day named therein for the hearing. The date named therein for the hearing at encl 7 was listed at 30 October 1985 whereas the Attorney General's Chambers received encl 7 on 22 October 1985 (see the affidavit of service affirmed by Zalhairi Mohd dated 26 October 1985 in encl 16). For purposes of calculating eight clear days, 30 October 1985 and 22 October 1985 must be excluded (O 3 r 2(4) of the RHC) and we are left with only seven clear days. There was a shortfall of one (1) solid day. Jeffrey Pinsler on *Civil Procedure* (1994, Butterworth Asia) at p 910 said this: 'Unless the judge gives a different direction the notice of motion must be served no less than eight clear days before the date of the hearing.' The same attitude was adopted by Chang Min Tat FJ (as he then was) in *Mallal's Supreme*

Court Practice (2nd Ed) Vol 1 at p 654 marginal paragraph 53/2/1 where he said that: 'There must be at least eight clear days between the service of the notice of motion or the summons and the return date. The motion must be also be entered for hearing within 14 days after the leave had been obtained.' I wholeheartedly agree with the views of these learned authors and, consequently, I ruled that the applicant had breached O 53 r 2(1) of the RHC.

Next, as a preliminary objection, it was argued by the learned senior federal counsel that the statement filed pursuant to O 53 r 1(2) of the RHC at encl 2 especially at para 3(a) was vague as it did not specify what was the error of law on the face of the record. It is now trite that only an error of law on the face of the record would attract judicial review (*R v Northumberland Compensation Appeal Tribunal, ex p Shaw* [1952] 1 KB 338; [1952] 1 All ER 122; *Baldwin and Francis Ltd v Patents Appeal Tribunal* [1959] AC 663; [1959] 2 WLR 826; [1959] 2 All ER 433 and nothing short of it would suffice. Thus, in *Minister of Labour and Manpower & Anor v Paterson Candy (Malaysia) Sdn Bhd* [1980] 2 MLJ 122 (FC), Chang Min Tat FJ (as he then was) delivering the judgment of the Federal Court said that: 'The court's power to investigate the question whether the Minister's decision was made with or without jurisdiction must mean that certiorari does not lie by way of an undisguised appeal on an error of fact.' Earlier in 1975, Abdoolcader J (as he then was) in *Mak Sik Kwong v Minister of Home Affairs, Malaysia (No 2)* [1975] 2 MLJ 175 at p 178 right hand column at E succinctly said:

> The general principle regarding the scope of judicial control is that questions of law are the specific province of the courts while questions of fact are for the administrative authorities. Once it is conceded that there is some evidence to support a finding of fact then the court has no jurisdiction to probe into its relative probative force and sufficiency (*Stocker v Minister of Health* [1938] 1 KB 655; *Jacob v A-G* [1970] 2 MLJ 329). A court will not interfere with the decision of an authority merely on the ground of errors of fact although these may be apparent on the face of the record unless the facts go to the root of the authority's jurisdiction, though even then a court will be reluctant to resolve a conflict of the evidence in proceedings conducted by affidavits.

Perhaps it is appropriate at this juncture to reproduce para 3(a) of encl 2 as follows:

> The Public Service Commission erred in law on the face of the record in that the Public Service Commission misdirected itself in that the applicant was negligent, had used his office for his own benefit, inefficient, dishonest and acted without responsibility.

It was the respondent's case that if the words as quoted above were in fact sufficient to show an error of law, that error of law must be a real error of law. And that where the error of law was not really clear or insignificant then the court has no choice but to accord the tribunal the benefit of the doubt. HWR Wade in his book entitled *Administrative Law* (5th Ed) at p 284 stated:

A Where the error is not really clear or is insignificant the court may give the tribunal the benefit of the doubt: as Lord Tucker once said, 'the inscrutable face of the sphinx' and 'the ambiguous voice of the oracle' may be much the same for this purpose (*Baldwin & Francis Ltd v Patents Appeal Tribunal* [1959] AC 663 at 687). In any case, certiorari is always a discretionary remedy.

B I need to emphasise that before an order of certiorari will be granted in respect of an error of law on the face of the record, it must be shown that the error has played a part in the decision arrived at (*R v Patents Appeal Tribunal, ex p British United Shoe Machinery Co Ltd* (1970) RPC 282). Obviously, looking at para 3(a) of encl 2, there is nothing to show C that the error has played a part in the decision arrived at by the Public Service Commission. It would not be incorrect to say that without stating the precise ground which the applicant was relying upon to support his substantive application, the respondent was in a dilemma as to the correct approach to adopt in rebutting the allegation of a misdirection of an error of law on the face of the record. In *Anisminic* D *Ltd v Foreign Compensation Commission* [1968] 2 QB 862; [1967] 3 WLR 382; [1967] 2 All ER 986, the Court of Appeal there held that an error of law within the jurisdiction of a tribunal, that is, an error of law in a case which is within the jurisdiction does not entitle the court to grant certiorari unless it be an error on the face of the record and no E statute excludes the power to grant it; but an error as to whether the tribunal has jurisdiction, whether it is an error as to fact or as to law, renders the decision a nullity and a proper subject for certiorari. On a plain reading of para 3(a) of encl 2, the misdirections enumerated therein were too numerous to pinpoint and it is this impediment that the respondent uses to say that whatever doubt that exists should be F given to the Public Service Commission.

Applying the same arguments, the respondent argued through the learned senior federal counsel that para 3(b) of encl 2 worded in the following fashion:

G The Public Service Commission erred in law and there are errors in law on the face of the record in that the Public Service Commission misdirected itself in presuming that the applicant was involved in the smuggling of the video cassette recorder on 20 December 1983.

was ambiguous and unclear as those words could either be a misdirection of law or of fact and being unclear and unknown, the respondent was H placed in a difficulty to rebut. I fully subscribe to this submission.

Next, para 3 (c) of encl 2 worded in this manner:

The Public Service Commission had acted in excess of its jurisdiction in presuming the applicant was guilty of the charges levied against him.

I was said to be unclear as it did not specify in what manner the Public Service Commission had acted in excess of its jurisdiction in presuming that the applicant was guilty of the charges levelled against him. It is now trite that jurisdictional defect may be founded on the character and the constitution of the authority or the nature of the subject matter

of the inquiry or the absence of some preliminary proceeding which was necessary to give it jurisdiction. Applying this simple proposition of law to para 3(c) of encl 2, it can thus be seen that this ground couched in its present form was vague, uncertain and unclear (*Colonial Bank of Australasia v Willan* (1874) LR 5 PC 417).

It must not be forgotten that where the Public Service Commission has jurisdiction to entertain the applicant's matter, that jurisdiction remains intact and does not lose its character even though it came to a wrong conclusion on the question of whether it was wrong in law or in fact (*R v Justices of the Central Criminal Court* (1886) 17 QBD 598; *R v Ludlow, ex p Barnsley Corporation* [1947] KB 634; [1947] 1 All ER 880).

On excess of jurisdiction, I need only refer to the passages appearing in the *Supreme Court Practice 1979* Vol 1, Part 1 at p 827 under marginal column 53/1-14/7 which merits reproduction as follows:

> Excess of jurisdiction is not shown merely because the inferior court has decided contrary to the facts, or without evidence to justify the decision, but only where in the circumstances it had no jurisdiction (*R v Nat Bell Liquors* [1922] 2 AC 128): for example, where the court acquits a defendant having already convicted him (*R v Essex JJ, ex p Final* [1963] 2 QB 816) or has imposed a sentence in excess of the statutory maximum (*R v Willesden JJ, ex p Utley* [1948] 1 KB 397), or where there has been a disregard of the fundamental conditions of the administration of justice (*R v Wandsworth JJ, ex p Read* [1942] 1 KB 281, [1942] 1 All ER 56), as where there is a real likelihood of bias or prejudice on the part of the tribunal (*R v Rand* LR 1 QB 233; *R v Camborne JJ, ex p Pearce* [1955] 1 QB 41; *R v Grimsby Borough Quarter Sessions, ex p Fuller* [1956] 1 QB 36; *R v Barnsley* [1960] 2 QB 167) and at common law a direct pecuniary interest in the subject matter of inquiry raises a conclusive presumption of bias (*R v Rand*, supra; *R v Barnsley*, supra), or where the decision was obtained by fraud (*R v Gillyard* 12 QBD 527; *R v Recorder of Leicester* [1947] KB 726) or perjury of the party (*R v Ashford, Kent JJ, ex p Rickley* [1956] 1 QB 167) or where the tribunal consults its clerk or some other stranger as to the proper finding to be made on the facts (Practice Direction [1953] 2 All ER 1306; *R v Stafford Borough JJ* [1962] 1 All ER 540). An order may appear on its face to have been made without jurisdiction, or the want of jurisdiction may be shown by affidavit evidence (*R v Toynbee Hall* [1939] 3 All ER at p 21).

Suffice it to say that since the applicant was asked to show cause as to why he should not be dismissed from the public service by letter dated 25 August 1984 and the applicant had replied by letter dated 31 August 1984 to that show cause letter, it could not be said that the respondent had acted contrary to the rules of natural justice in dismissing the applicant (see paras 4, 5, 6 and 10(e) of the applicant's affidavit in encl 1) by letter dated 12 February 1985 which was received by the applicant on 4 March 1985. These brief set of facts must be taken into account in order to appreciate the respondent's submission that the excess of jurisdiction referred to in para 3(c) of encl 2 lacked particulars and were not specific.

Next, it was argued that certain grounds in the affidavit of the applicant in encl 1 especially paras 10(b) to (e) should not be relied upon by the applicant as these grounds were not specified in the statement in encl 2. There is merit to this argument. Order 53 r 3(1) of the RHC clearly bars the applicant from relying on the grounds set out in the affidavit but not reflected in the statement. What confounds the matter further was that the statement in encl 2 and the affidavit in encl 1 were the very documents that were used to support the applicant's notice of motion for leave in encl 3 and these documents were not attached nor exhibited in the notice of motion for the substantive application in encl 7 and, consequently, as stated in the early part of this judgment, were not served on the respondent or the Attorney General. Without the statement and the affidavit the applicant cannot go far. His application for certiorari has to fall flat to the ground. On this point, I am fortified by the passages appearing in the judgment of Chang Min Tat FJ (as he then was) in the case of *Dr A Dutt v Assunta Hospital* (supra), especially at p 309 left hand column between C to G, where his Lordship said this:

> There appears therefore to have been a complete disregard of the procedure prescribed and to be followed by the solicitors for the hospital. No point was however taken by counsel for Dr Dutt at any stage of the proceedings. We have however mentioned them not merely to draw attention to the fact that the new rules, the Rules of the High Court 1980, continue largely the same practice, O 53 r 1(2) requiring such a statement, rule 1A limiting the time for such an application, now, to six weeks of the order sought to be quashed and rule 3(1) providing that subject to the discretion of the court, no grounds shall be relied upon and no reliefs sought except those set out in the statement. We have done so also because the same solicitors had previously filed such a statement in its application for prohibition and because as will be seen, this amorphous application enabled the hospital to roam at large, well outside its proper confines.
>
> Lacking the statement, the High Court resorted to the affidavit of Datuk Lee Eng Teh for the grounds on which the application was sought. We would observe that even under the old rules, O 59 r 6, provided that unless the court in its discretion allowed an amendment, no grounds should be relied upon or any relief sought except the grounds and relief set out in the statement: see now O 53 r 3(1) Rules of the High Court 1980.

The applicant before me did not apply to amend the notice of motion (encl 7) in support of the substantive motion to incorporate the statement and the affidavit and, after amendment, to have these documents served on the respondent and the Attorney General. Even if there was an application to amend, it would be too late in the day; the whole episode took place some ten years ago and, as rightly submitted by the learned senior federal counsel, the fresh grounds in encl 1 of para 10(b) to (e) if allowed to stand would seriously prejudice the respondent in preparing a reply as the original members of the Public Service Commission that deliberated on the applicant's case have either retired or died and if

they have retired they may have difficulties in recollecting the whole incident thereby making it absolutely impossible for the respondent to rebut the fresh grounds thereto. In my judgment, the procedural defects went into the heart of the substantive motion as to render it defective and hopelessly incurable. To recapitulate, the failure to particularise the error of law on the face of the record and the excess of jurisdiction, the failure to comply with the time frame of serving the originating motion for the substantive motion, the failure to serve the statement and the affidavit together with the notice of motion to the respondent and the Attorney General and, lastly, the failure to incorporate the fresh grounds in encl 1 of para 10(b) to (e) of the affidavit in the statement itself — all these procedural defects were so grave and serious as to render these proceedings a nullity (see *Harkness v Bell's Asbestos & Engineering Ltd* [1967] 2 QB 729 at p 735; [1967] 2 WLR 29; [1966] 3 All ER 843 (CA) where the distinction between a non-compliance such as rendered the proceedings a nullity (in which case the court had no discretion but to treat as a nullity and set them aside) and a non-compliance which merely rendered the proceedings irregular (in which case they remained valid and the court had a discretion what order to make in the circumstances) was highlighted). But in the context of this case, though the preliminary objections were made informally and the delay in raising the preliminary objections had been explained by the learned senior federal counsel at the bar to the effect that he was recently transferred to the State Legal Adviser's Chambers in Johor Bahru and had been assigned the task of handling the present case and on perusal of the relevant file it dawned upon him that there were procedural defects to the substantive motion and, as an officer of the court, he had no choice but to raise the preliminary objections. I accepted these explanations and for the reasons adumbrated above, I dismissed encl 7 with costs.

By way of a postscript, I must at once say that this case had been kept in abeyance for far too long a time. Somehow, this case did not go off the ground for all these years. Just like the learned senior counsel, I too came here on transfer from Taiping High Court quite recently and, on sighting this file, I had immediately directed the senior assistant registrar to fix this case for hearing. This was done and this is the outcome of that hearing. Justice, though delayed, was eventually delivered to the applicant notwithstanding the fact that he lost in these proceedings.

Application dismissed.

Reported by Raymond Tsui Wai Nam